

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ERIC L. DALE,

Petitioner,

v.

BRIAN E. WILLIAMS, *et al.*,

Respondents.

Case No. 3:20-cv-00031-MMD-CLB

ORDER

I. SUMMARY

This is a habeas corpus action brought under 28 U.S.C. § 2254 by Petitioner Eric L. Dale, a Nevada prisoner who is represented by the Federal Public Defender. Before the Court is Dale's Motion for a Stay and Abeyance. (ECF No. 47.) Respondents oppose the requested stay (ECF No. 48), and Dale has replied (ECF No. 53). For the reasons discussed below, the Court denies the motion for stay.

II. BACKGROUND

A. State-Court Proceedings

A jury in Washoe County, Nevada convicted Dale of attempted murder with use of a deadly weapon, battery of with a deadly weapon, and discharging a firearm at or into an occupied vehicle. (Exh. 40, ECF No. 54-3.) The charges stemmed from a 2013 incident when Dale got into a car accident in Reno, abandoned his car, and began walking down the middle of a busy street. (See ECF No. 44 at 2.) He called 911 and told the operator that 15-20 people were chasing him. When a police car drove by, Dale tried to flag the officer down. Then Dale walked up to a car stopped at a red light, raised his gun to the window, and fired into the car. The driver survived. In September 2014, the state district court adjudicated Dale a habitual criminal and sentenced him to life in prison with the possibility of parole after 10 years. (Exh. 43, ECF No. 54-6, Exh. 44, ECF No. 54-7.)

1 Dale appealed, and the Nevada Court of Appeals affirmed his convictions. (Exh.
2 65, ECF No. 55-18.) The Nevada Court of Appeals affirmed the denial of his state
3 postconviction habeas corpus petition in December 2019. (Exh. 105, ECF No. 57-17.)

4 **B. Federal Habeas Proceedings**

5 In January 2020, Dale dispatched his *pro se* federal habeas petition for mailing.
6 (ECF No. 1-1.) Counsel was appointed, and this Court granted equitable tolling for the
7 time period when COVID-19 protocols prevented Dale's counsel from having a
8 neuropsychologist examine Dale and prepare a report. (ECF No. 15.) Dale ultimately filed
9 a second-amended petition in July 2022, setting out 8 grounds for relief:

10 Ground 1: Trial counsel ineffectively failed to investigate (A) a Not
11 Guilty By Reason of Insanity ("NGRI") defense and (B) a voluntary
12 intoxication defense in violation of the Sixth and Fourteenth
Amendments.

13 Ground 2: Dale was not competent during his trial in violation of the
14 Fifth, Sixth, and Fourteenth Amendments.

15 Ground 3: Trial counsel was ineffective for failing to seek a
16 psychiatric evaluation of Dale concerning his competency as Dale
17 was not competent during his trial in violation of the Fifth, Sixth, and
Fourteenth Amendments.

18 Ground 4: Trial and appellate counsel were ineffective for failing to
19 object to the sentencing enhancement based upon the State's
20 presentation of incomplete court records in violation of the Fifth,
Sixth, and Fourteenth Amendments.

21 Ground 5: Trial and appellate counsel were ineffective for failing to
22 object to the amendment to the indictment on count III after
23 presentation of evidence and the conclusion of the State's case in
violation of the Sixth and Fourteenth Amendments.

24 Ground 6: Dale was convicted of all counts on insufficient evidence
25 in violation of the Fifth, Sixth, and Fourteenth Amendments.

26 Ground 7: Dale was denied his constitutional right to present a
27 complete defense in violation of his due process rights under the
Fifth, Sixth, and Fourteenth Amendments.

28 Ground 8: Dale's counsel ineffectively failed to investigate or present
important mitigating evidence at Dale's sentencing in violation of the
Fifth, Sixth, and Fourteenth Amendments.

(ECF No. 44.) Dale now asks the court to stay these proceedings so that he can return to state court to exhaust grounds 1 and 8. (ECF No. 47.)

III. DISCUSSION

A. Legal Standards

A federal court may not grant relief on a habeas corpus claim not exhausted in state court. See 28 U.S.C. § 2254(b). The exhaustion doctrine is based on the policy of federal-state comity and is designed to give state courts the initial opportunity to correct constitutional deprivations. See *Picard v. Conner*, 404 U.S. 270, 275 (1971). To exhaust a claim, a petitioner must fairly present the claim to the highest available state court and must give that court the opportunity to address and resolve it. See *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992).

The Supreme Court has recognized that under certain circumstances it may be appropriate for a federal court to anticipate a state-law procedural bar of an unexhausted claim, and to treat such a claim as subject to the procedural default doctrine. “An unexhausted claim will be procedurally defaulted, if state procedural rules would now bar the petitioner from bringing the claim in state court.” *Dickens v. Ryan*, 740 F.3d 1302, 1317 (9th Cir. 2014) (citing *Coleman v. Thompson*, 501 U.S. 722, 731 (1991)).

Turning then to the procedural default doctrine, in *Coleman*, the Supreme Court held that a state prisoner who fails to comply with state-law procedural requirements in presenting his claims in state court is barred by the adequate and independent state ground doctrine from obtaining a writ of habeas corpus in federal court. See 501 U.S. at 731-32 (“Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State’s procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance.”). Where such a procedural default constitutes an adequate and independent state ground for denial of habeas corpus, the default may be excused only if “a constitutional violation has probably resulted in the conviction of one

1 who is actually innocent,” or if the prisoner demonstrates cause for the default and
2 prejudice resulting from it. *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

3 To demonstrate cause for a procedural default, the petitioner must “show that
4 some objective factor external to the defense impeded” his efforts to comply with the state
5 procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external impediment
6 must have prevented the petitioner from raising the claim. See *McCleskey v. Zant*, 499
7 U.S. 467, 497 (1991). With respect to the prejudice prong, the petitioner bears “the burden
8 of showing not merely that the errors [complained of] constituted a possibility of prejudice,
9 but that they worked to his actual and substantial disadvantage, infecting his entire
10 [proceeding] with errors of constitutional dimension.” *White v. Lewis*, 874 F.2d 599, 603
11 (9th Cir. 1989) (citing *United States v. Frady*, 456 U.S. 152, 170 (1982)).

12 In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court ruled that ineffective
13 assistance of postconviction counsel may serve as cause with respect to a claim of
14 ineffective assistance of trial counsel. The *Martinez* Court stated: “Where, under state
15 law, claims of ineffective assistance of trial counsel must be raised in an initial-review
16 collateral proceeding, a procedural default will not bar a federal habeas court from hearing
17 a substantial claim of ineffective assistance at trial if, in the initial review collateral
18 proceeding, there was no counsel or counsel in that proceeding was ineffective.” 566 U.S.
19 at 17; see also *Trevino v. Thaler*, 569 U.S. 413, 423 (2013) (regarding the showing
20 necessary to overcome a procedural default under *Martinez*). However, in *Shinn v.*
21 *Ramirez*, 142 S.Ct. 1718 (2022), the Supreme Court recently held that in adjudicating a
22 *Martinez* claim, “a federal habeas court may not conduct an evidentiary hearing or
23 otherwise consider evidence beyond the state-court record based on ineffective
24 assistance of state postconviction counsel” unless the petitioner satisfies the stringent
25 requirements of 28 U.S.C. § 2254(e)(2). 142 S.Ct. at 1734. The *Ramirez* Court
26 acknowledged that § 2254(e)(2) applies only when there has been “a failure to develop
27 the factual basis of a claim,” something that “is not established unless there is a lack of
28 diligence, or some greater fault, attributable to the prisoner or the prisoner’s counsel.” *Id.*

1 at 1735. The Court explained, though, that a prisoner bears the risk for all attorney errors
2 unless counsel provides constitutionally ineffective assistance, and since there is no
3 constitutional right to counsel in state postconviction proceedings, “a prisoner ordinarily
4 must ‘bea[r] responsibility’ for all attorney errors during those proceedings.” *Id.* (quoting
5 *Williams v. Taylor*, 529 U.S. 420, 432 (2000)). “Among those errors,” the Court explained,
6 “a state prisoner is responsible for counsel’s negligent failure to develop the state
7 postconviction record.” *Id.* So, the Supreme Court held, in such a case, a federal court
8 may order an evidentiary hearing or otherwise expand the state-court record only if the
9 prisoner can satisfy the requirements of § 2254(e)(2). See *id.* Under § 2254(e)(2), if the
10 petitioner has “failed to develop the factual basis of a claim in State court proceedings,”
11 a district court cannot hold an evidentiary hearing on the claim unless (1) the claim relies
12 on either a new rule of constitutional law made retroactive by the Supreme Court to cases
13 on collateral review or a factual predicate that could not have been previously discovered
14 through due diligence and (2) the facts underlying the claim would establish by clear and
15 convincing evidence that but for constitutional error, no reasonable factfinder would have
16 found the applicant guilty. See 28 U.S.C. § 2254(e)(2).

17 Regarding the legal standard governing a motion for an exhaustion stay, a district
18 court is authorized to stay a habeas action in “limited circumstances” while a petitioner
19 presents unexhausted claims to the state court. *Rhines v. Weber*, 544 U.S. 269, 273-75
20 (2005). Under *Rhines*, “a district court must stay a mixed petition only if: (1) the petitioner
21 has ‘good cause’ for his failure to exhaust his claims in state court; (2) the unexhausted
22 claims are potentially meritorious; and (3) there is no indication that the petitioner
23 intentionally engaged in dilatory litigation tactics.” *Wooten v. Kirkland*, 540 F.3d 1019,
24 1023 (9th Cir. 2008) (citing *Rhines*, 544 U.S. at 278).

25 The Ninth Circuit Court of Appeals has acknowledged that the *Rhines* “good
26 cause” standard does not require “extraordinary circumstances.” *Id.* at 1024 (citing
27 *Jackson v. Roe*, 425 F.3d 654, 661-62 (9th Cir. 2005)). Ineffective assistance of
28 postconviction counsel or a lack of postconviction counsel can constitute good cause

under *Rhines*. See *Blake v. Baker*, 745 F.3d 977, 982-83 (9th Cir. 2014); *Dixon v. Baker*, 847 F.3d 714, 721 (9th Cir. 2017). But courts “must interpret whether a petitioner has ‘good cause’ for a failure to exhaust in light of the Supreme Court’s instruction in *Rhines* that the district court should only stay mixed petitions in ‘limited circumstances.’” *Wooten*, 540 F.3d at 1024 (citing *Jackson*, 425 F.3d at 661). Courts must also be “mindful that AEDPA aims to encourage the finality of sentences and to encourage petitioners to exhaust their claims in state court before filing in federal court.” *Id.* (citing *Rhines*, 544 U.S. at 276-77).

B. Analysis

Dale argues that he satisfies *Rhines* because grounds 1 and 8 are meritorious, he can demonstrate good cause for his failure to exhaust the claims because his state postconviction counsel was ineffective, and he has not engaged in dilatory tactics. Grounds 1 and 8 are claims of ineffective assistance of counsel at trial and sentencing. In ground 1 Dale alleges that his trial counsel: (A) failed to investigate an insanity defense; and (B) failed to investigate and present a voluntary intoxication defense. (ECF No. 44 at 8-13.) In ground 8 Dale asserts that his counsel failed to investigate and present mitigation evidence at sentencing. (*Id.* at 27-29.) Dale acknowledged in his petition that he did not present ground 1 to the state courts but argued that he could demonstrate cause and prejudice to overcome the procedural default. (*Id.* at 13.) He states in his petition that he presented ground 8 “or a similar claim” to the Nevada Supreme Court in his state postconviction proceedings. (*Id.* at 29.)

In his motion for stay, Dale now argues that the two grounds are supported by evidence that was never presented to the state courts. (ECF No. 47 at 2.) He claims his state postconviction counsel was ineffective for failing to develop these ineffective-assistance-of-trial-counsel claims and to present pertinent evidence to state courts. He points to the Supreme Court’s statement in *Ramirez* that “a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel.” 142 S. Ct. at

1 1734, 1739. Dale urges that *Ramirez*'s emphasis on evidentiary development in state
2 courts can be viewed as a strong signal to the state courts to provide a sufficient
3 opportunity for petitioners to develop their claims. If granted a stay, Dale intends to
4 develop the state court factual record to include the new evidence. He acknowledges that
5 taking this step would only *potentially* allow this Court to consider the new evidence at the
6 merits stage because Dale will have developed the factual basis of his claims, or at the
7 very least, attempted to develop the factual basis of his claims. Dale makes no argument
8 that he can overcome the procedural bars of the claims in grounds 1 and 8 in state court
9 under current Nevada law. But he asserts that he "can argue that the Nevada Supreme
10 Court could reconsider its decision in *Brown v. McDaniel*, 331 P.3d 867, 870-75 (Nev.
11 2014)," in which "the Nevada Supreme Court declined to follow [*Martinez*] and allow
12 ineffective assistance of post-conviction counsel to act as good cause in non-capital
13 cases." (ECF No. 61 at 4-5.)

14 Respondents insist that Dale fails to satisfy the *Rhines* criteria. (ECF No. 48.) Dale
15 previously filed a state habeas petition, and any petition that he files now will be untimely
16 and successive, unless he can demonstrate cause and prejudice in state court or that he
17 is actually innocent. See NRS § 34.726. Respondents point out that Dale does not assert
18 that he can overcome the state procedural bars or that he is actually innocent, thus the
19 claims are technically exhausted but procedurally defaulted. They argue that nothing in
20 *Rhines*, or any other United States Supreme Court case, suggests that a federal court
21 should grant a stay so the petitioner can return to state court to raise an unexhausted or
22 procedurally defaulted claim with new evidence in state court, if the state court cannot
23 consider the claim due to its procedural bars.

24 Dale suggests that attaching his newly-developed evidence to an untimely and
25 successive petition filed in state court would constitute developing the factual basis of a
26 claim or an "attempt" to develop the factual basis of a claim. But AEDPA expressly states
27 that a federal court cannot consider any new evidence where the petitioner "failed to
28 develop the factual basis of a claim in State court proceedings." 28 U.S.C. §2254(e)(2).

1 Nor does Dale's proposal to return to state court square with *Williams*, where the Supreme
2 Court made it clear that a petitioner must properly develop the factual basis of his claim
3 in accordance with state law. See 529 U.S. at 437 ("Diligence will require in the usual
4 case that the prisoner, at a minimum, seek an evidentiary hearing in state court *in the*
5 *manner prescribed by state law.*") (emphasis added). This Court agrees with
6 Respondents that accepting Dale's argument that attaching documents to an untimely
7 and successive state habeas petition constitutes fairly developing the factual basis of his
8 claim would reduce AEDPA's requirements to a meaningless formality. *Cf. Ramirez*, 142
9 S. Ct. at 1738 (explaining that accepting the petitioner's similar argument "would have
10 countenanced an end-run around the statute.").

11 The Court denies Dale's request for a stay. A *Rhines* stay aims to allow a federal
12 habeas petitioner an opportunity to present unexhausted claims in state court. But here,
13 the claims in grounds 1 and 8 are not unexhausted. It is undisputed that those claims are
14 procedurally barred in state court, and Dale makes no argument that he can overcome
15 the procedural bars under current Nevada law. Therefore, the Court finds that the claims
16 in grounds 1 and 8 are technically exhausted but subject to application of the procedural
17 default doctrine. Under these circumstances, granting Dale's request for a *Rhines* stay
18 would be contrary to the Supreme Court's instructions that exhaustion stays should be
19 granted in only limited circumstances and that the Court is to be mindful of AEDPA's aims
20 of encouraging the finality of sentences and encouraging petitioners to exhaust their
21 claims in state court before filing in federal court.

22 IV. CONCLUSION

23 It is therefore ordered that Petitioner's Motion for a Stay and Abeyance (ECF No.
24 47) is denied.

25 It is further ordered that Respondents have 30 days to file a response to the
26 second-amended petition.

27 DATED THIS 18th Day of May 2023.

28 
MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE